KEEL COTTRELLE LLP
barristers and solicitors

Insights

Employment & HR Law

October 2010

Arbitrator confirms suspension not dismissal for inappropriate sexual contact with student

Arbitrator finds bolus insulin pump not injection

Arbitrator rescinds transfer based on community perceptions

Court of Appeal provides guidance on privacy issues with Unions

Arbitrator award supports flexible model in assignment of Educational Assistants

Tribunal awards damages for poisoned work environment

Court supports dismissal of Human Rights Complaint

Yukon Court of Appeal upholds decision of non-discrimination

Arbitrator dismisses complaint based on physical disability for use of drugs

Tribunal finds breach of Code based on record of offences

Grievance Board finds no discrimination on basis of family status

Court finds wrongful dismissal for employee with personal issues

Court reviews indicia of employment / independent contractor

PDF Download

Download this edition as a PDF

Employment & HR Law Publications Archive

Arbitrator confirms suspension not dismissal for inappropriate sexual contact with student

In Near North District School Board v. Ontario Secondary School Teachers' Federation, District 4, [2009] O.L.A.A. No. 367, (Herman), Arbitrator Herman dealt with a grievance of wrongful dismissal. The grievor had been alleged to have sexually assaulted a female grade 12 student ("Student A"). During the investigation, two other female students came forward ("Student B" and "Student C"). The criminal

charges against the grievor were dismissed, as were the complaints before the Ontario College of Teachers.

The Arbitrator made note of the credibility issues of a number of witnesses. As the grievance was being dealt with more than four years after the termination, memories had faded. The Arbitrator found that in addition to the natural erosion of memories, it was clear that Student A and Student C embellished some of their allegations to paint the grievor in a negative light. The grievor was also found to deny otherwise corroborated evidence.

The grievor had been a teacher for well over a decade and had a clean discipline record until the allegations that are the subject of this grievance. The grievor taught a course on AutoCad, which was a course in technical design and computer skills. The grievor had a history of positive performance reviews.

Student A stated that the grievor told her she looked attractive in her glasses; however, others in the class stated that the grievor told Student A that she should wear her glasses to see the overhead projector and that many students wear glasses and all look fine. Students A and C stated that when the grievor assisted them, he would often put his arms around their shoulders or put a hand on their shoulder.

Student A noted a number of events that bothered her. Student A stated that she was bothered by the grievor's comment that girls today had bigger chests than in his time. This was a statement the grievor denied making in reference to women; rather, the grievor stated that the comment was made during a conversation where the grievor remarked, in reference to his daughters, that the chemicals in such foods as poultry were having concrete effects on humans (i.e. female breast size). Student A was bothered by an occasion in which the grievor asked her if she was OK, as Student A looked tired, and followed by stating that was why the grievor liked Student A, and kissed Student A on the cheek. The incident was discussed amongst Student A's peers and Student A eventually told her parents.

At the time that Student A told her parents of the "kiss" incident, Student C had told her parents of her feeling uncomfortable when the grievor

would approach and touch her during class. Student C, who was not a student of the grievor at the time, stated that she went to the grievor's class to get graph-paper for her class and the grievor motioned her to his desk. The grievor then allegedly touched Student C along her waist. The grievor denied this. The Arbitrator determined that the grievor made Student C uncomfortable, but likely did not touch her around her waist.

Student B's first complaint regarding the grievor concerned a class in which the grievor allowed students to create videos for the rest of the class to watch. According to Student B, in one class, a video focused on the chest of another student. The student was upset and asked the grievor to fast-forward the movie. The grievor said no, and played the video a second time. Another complaint occurred when the grievor told Student B that she looked great in her dress that she wore in preparing to film another video. The third incident which Student B complained about was following her grandmother's funeral. The grievor gave her a multi-second frontal hug to express his condolences. This made Student B uncomfortable.

The culminating incident occurred upon Student A's visit to the Guidance Counselor. Student A had sought to switch out of the grievor's class. During the meeting with the Guidance Counselor, Student A alleges that she broke down due to the aggregate sexual abuses of the grievor. The Teachers' Federation argues that Student A merely sought a reason to change out of the grievor's class due to her low grades. Following this complaint, the school implemented an investigation against the grievor.

The grievor filed a separate grievance regarding this investigation, alleging that other students referenced in the complaints against the grievor were not interviewed and that interview notes were not provided to the grievor or Teachers' Federation upon request. The notes that were provided to the grievor included only the alleged complaint, but without any time-reference. The Board provided the grievor with the names of the Complainants, but did not provide the names of other students referenced in the complaints.

The grievor was dismissed following a vote of the School Board trustees. The four criminal charges against the grievor in relation to the subject matter of this grievance were dismissed as the Court concluded that there was no sexual purpose for the contact. This Court finding was accepted by the Arbitrator.

The Board argued that the dismissal was just. While the Board was not suggesting that the grievor was attempting to start a sexual relationship with the students, the grievor was sexist, insensitive and sexually harassed female students. Additionally, the Board maintained that it conducted a reasonable investigation into the allegations.

The Teachers' Federation highlighted the previous record of the grievor, which was clean, and that the School Board had recently changed its position as it previously asserted that the grievor was attempting to start a sexual relationship with the students. The Federation argued that, after the charges against the grievor were dropped the School Board amended its reasons for dismissal.

The Arbitrator noted that some of the alleged behaviour did not occur or was not misconduct. Nonetheless, the Arbitrator noted that some conduct was improper and inappropriate, such as putting his arms on the shoulders of students and kissing Student A on the cheek.

The Arbitrator noted that students are entitled to a learning environment free from harassment or inappropriate boundary violations by teachers. In this case, the kissing incident, the graph-paper incident, the full-frontal hug and the placement of the grievor's arms on the student's shoulders were the type of behaviour that had no place in the classroom. The Arbitrator found that the grievor still harboured negative feelings towards the student Complainants, but those students have since-graduated, so those feelings were less relevant.

On the facts of this case, the Arbitrator found that the grievor deserved discipline; however, discharge was excessive. A significant portion of the Board's decision to discharge the grievor were based upon allegations that were not proven, that the grievor was attempting to start a sexual relationship with the Complainants. The appropriate penalty, in the Arbitrator's opinion, was to impose a suspension on the grievor, without

pay, until the day after the criminal proceedings against the grievor concluded. While the flaws in the investigation may have lent themselves to impose a lesser suspension on the grievor, the Arbitrator was of the opinion that a corrected investigation would have led to the same result, and thus any deficiency in the investigation would not affect the suspension period.

Arbitrator finds bolus insulin pump not injection

The requirement that an Educational Assistant ("EA") administer medication by injection to a student was the focus of a recent arbitration grievance in Toronto District School Board v. Canadian Union of Public Employees, Local 4400,(Eberhardt-Butler Grievance), [2010] O.L.A.A. No. 116 (Davie). Specifically, the issue was whether the requirement to operate the insulin pump was a requirement to administer medication by injection.

The student, who had Type 1 Diabetes and was in Junior Kindergarten at the time, required the assistance of three EAs, including the grievor, to check her blood glucose level at 2 p.m. each day using a blood glucose meter. The assigned EAs would rotate the duty of monitoring the student's blood glucose level. In the monitoring process, the EAs would be required to prick the student's finger and transfer a drop of blood onto a strip which could be inserted into the blood glucose monitor where a glucose reading would be obtained. The EA would record the reading and take necessary follow-up steps as appropriate, including providing a snack or increasing the student's physical activity, depending upon the reading.

During the summer months leading up to the senior kindergarten year, the student was placed on a bolus insulin pump. Training was provided for the EAs on the insulin pump and the new monitoring process. The insulin pump required the EA to tally up the carbohydrate value of the food eaten by the student, based on the values written on the packages given by the parents and make any necessary adjustments if only a portion of the food was eaten. Next, the EA would be required to measure the student's blood glucose level which would be provided by the glucose monitor. The EA was required to enter the student's blood

glucose level and the carbohydrate value of the food into the insulin pump, and the pump would dispense the appropriate amount of insulin into the cannula which was already inserted into the student's body. When the student's blood glucose levels were unusually high or low, or if the cannula portion of the insulin pump was accidentally disconnected, the EAs were advised to seek instructions from the student's parents or Sick Kids Hospital for assistance. When finished, the pump would indicate that the insulin had been delivered and in circumstances where more insulin was not needed, the pump would not dispense a surge dose.

From January to March 2008, the grievor was solely responsible for checking the student's blood glucose level and dealing with the insulin pump daily at 2 p.m. Another EA was trained shortly thereafter, and the two EAs rotated this duty for the remainder of the year. For the student's grade 1 year, the EAs, including the grievor, rotated this task at 10 a.m. and 2 p.m. daily.

The Arbitrator reviewed the relevant collective agreement provisions, which expressly prohibited the administration of medication by injection to students, as well as the definition and meaning given to the words "administer" and "injection" in the absence of arbitral jurisprudence on this issue.

Counsel for the grievor argued that by requiring the EA to operate the insulin pump, which injects or forces medication into the student's body, this was administering medication which was clearly contrary to the collective agreement provision. The Union also argued that it was the EA's actions which caused the bolus insulin to be injected and that this active operation of the pump to inject medication through the tube inserted under the student's skin was administering mediation by injection.

Counsel for the Board submitted that the plain meaning of the collective agreement language was that an EA was not required to give injections to students. The Board argued that the EA's operation of the insulin pump was an exercise of data entry into a device which delivers medication. The Board also highlighted that included in the EA's job

description was assisting the needs of students, including “approved administration of medication/medical procedures with appropriate training.”

The Arbitrator reviewed the evidence on the insulin pump’s functions and determined that the EA’s operation of the insulin pump was not equivalent to the administration of medication by injection. Dismissing the grievance, the Arbitrator noted that the EA’s actions were similar to a programming function, and the device was the unit responsible for determining whether medication was required and if so, administering the requisite dosage.

This decision demonstrates that the administration of medication, and the issue of “injection” will continue to be of concern for Boards and staff.

Arbitrator rescinds transfer based on community perceptions

In Rolling River School Division v. The Rolling River Teachers’ Association of the Manitoba Teachers’ Society (Peltz), [2009] M.Q.A.D. No. 41, Arbitrator Peltz upheld a grievance that the grievor had been wrongfully transferred to another school. The grievor had been transferred to another school within the board after it was discovered that she was in a relationship with her supervisor, the principal of the former school.

The grievor had been separated for two years and had started a relationship with the principal of the former school during the 2008-2009 school year. The principal at the former school had been separated from his wife for a couple of months prior to starting a relationship with the grievor. Both parties contended that the relationship did not commence prior to the principal’s separation. Rumours of the relationship started a couple of weeks after the principal of the former school's separation.

Prior to the transfer, the grievor's duties at the former school were divided as follows: 75% of her time as a Guidance Counsellor and 25% of her time as a teacher of Grade 5 Science. The transfer required the grievor to split her time between three schools: 75% of her time as High School Guidance Counsellor at one school, and 25% of her time split

between two other schools as an Elementary School Guidance Counsellor.

The transfer required a third-party teacher to change her schedule. The third party teacher did not file a grievance; however she did state her opposition to the transfer as she did not feel it was in accordance with the best interests of the students or in consideration of the teacher's proximity to the school. The grievor and third-party teacher both thought their skill-set was best suited for elementary students and high school students respectively.

The grievor's skill-set, which included her enrolment in a Masters program in Guidance and Counseling, involved playground issues such as bullying, social skills development, and addressing emotional needs and fears. The grievor took the position that an assignment to high school was within her capabilities, but would take approximately three years before she would be confident in her performance, and that such time estimate would not include the psychological damage done to the elementary school students she was leaving.

The third party teacher was going through a separation of her own and had let the School Division know of her desire to move to a specific school. The available position at that school was filled and the third-party-teacher was told of the assignment that was at issue in this grievance. The third-party-teacher, assuming that refusal of the assignment was not an option, accepted the assignment, but stated she hoped such an assignment would be temporary. The third-party-teacher was disappointed to discover, after the assignment, that 25% of her time would be spent teaching science, a course she had never taught. The third-party-teacher agreed with the grievor that such a transfer would require a number of years before either teacher was comfortable.

Evidence of the third-party-teacher related to personal and professional concerns were disregarded as that teacher did not personally file a grievance. However, the Arbitrator did accept evidence related to negative impacts on students resulting from the transfer. The third-party-teacher's skill-set focused on dealing with depression, sexuality issues, career counselling and abuse.

The Association felt that the transfer was on the basis of intolerant community reaction to the grievor's relationship with a married, but separated, supervisor. The Association challenged this transfer on multiple grounds: (i) that it failed to consider the educational needs of the students; (ii) the lack of consideration for either the grievor or the third party teacher's concerns; (iii) the absence of a meaningful consultation process; (iv) the violation of the school division's policy on transfers (the process is supposed to ensure that student welfare is of primary importance, teaching background and expertise is to match the assignment, and the teacher's place of residence is considered).

The Association took the position that the transfer was needlessly excessive and did not sufficiently consider the alternative methods of accommodation. Rather than transfer the grievor, the Association contended that the School Division could appoint a vice-principal to evaluate the grievor to negate any inferences of a conflict of interest. The Association sought that the transfer be rescinded and that, if real problems arise in the administration of the school due to issues between the grievor and principal, then the grievor could be transferred.

The School Division took the position that it was in compliance of its transfer policy. The School Division implemented transfers as a common occurrence within school boards and that the skills of the grievor and third-party teacher sufficiently matched the assignment such that there were no adverse effects to the students. Due to the inevitable problems that would arise between staff if such a relationship continued within one school, the School Division took the position that the status-quo would negatively affect the students.

The School Division and grievor pointed out that Guidance Counsellors and principals had a closer relationship than classroom teachers and principals, in general. The principal at the former school described the relationship as collaborative and directed towards the best interests of the students. Both parties also agreed that the principal was the dispute resolver if there were disagreements between staff and that dating between similarly-positioned individuals was different than relationships between subordinate and supervisor. The grievor, however, felt that

teachers were sufficiently professional to not let any fears related to favouritism materialize.

The School Division relied on the view of the superintendent. The superintendent held the view that the competency and qualifications of both teachers would not present a concern regarding the transfer. The superintendent was aware of the third-party-teacher's general qualifications and stated that upon a transfer, it was the principal's responsibility to match the transferring teacher's skill set to an appropriate assignment. Thus, the superintendent was of the view that the School Division was in compliance with its transfer policies.

The School Division submitted that there were a total of six meetings between the superintendent, the grievor and the principal at the former school, which provided evidence of meaningful consultation. The assignment took into account student needs as both were very capable teachers. The Division also viewed the relationship of the grievor and principal at the former school as untenable since only one compliant of a coworker may affect morale contrary to the administrative needs of the Division. The Division also had concerns regarding the evaluation of the grievor by the principal at the former school. Of note is that the superintendent's wife worked as a principal at a school within the Division and thus the superintendent was evaluating his spouse.

Utilizing the standard of reasonable consultation, the Arbitrator found that the reason for the transfer was community perceptions of an immoral relationship, and not the specific concerns of the administration of the school. The Arbitrator found that the superintendent's questions regarding the existence of an intimate relationship were allowable, that such a relationship may expose the employer to litigation risks and that guarding against the perception of favouritism is a valid concern of an employer. However, no such issues had yet arisen. The superintendent had the responsibility to look beyond potential adverse impacts to ensure that it was meeting its duty of fairness to the individuals involved.

Since the School Division based its decision on the irrelevant factor of community perception, the transfer was to be rescinded. However, the Arbitrator left open the possibility that should an issue arise or be

reasonably anticipated, the School Division may exercise its right to transfer the employee.

Court of Appeal provides guidance on privacy issues with Unions

In Bernard v. Canada (Attorney General), [2010] F.C.J. No. 170, the Court of Appeal dealt with a complaint that the Public Service Labour Relations Board (the "Board") violated Ms Bernard's (the "Complainant") privacy by ordering her employer to provide her home address and phone number to the Union which represents her.

The Complainant is characterized as a "Rand formula employee", which means that the Complainant pays Union dues and benefits from Union representation, but is not a member of the Union. The Complainant received correspondence from the Union at her home address and inquired as to how the Union received such information. The Complainant was told that the employer provided the Union with the information. The Complainant filed a Complaint with the Privacy Commissioner alleging that her employer violated her privacy rights. The Privacy Commission determined that the employer had violated her rights.

Following this Complaint, the employer abandoned the policy of providing such information to Unions. Over a decade later, the Complainant occupied a different position. During this time, the Union representing the Complainant requested her personal contact information. The employer did not respond to this request. The Union filed a Complaint against the employer to the Labour Relations Board. The Board, as result of the Complaint, ordered the employer to provide the information to the Union on a quarterly basis.

The Complainant was away from work when the Order was delivered. Upon first learning of the Order, the Complainant successfully gained an extension of time to bring an Application for Judicial Review of the Board's Order. The Complainant argued that the Order infringed her privacy rights and infringed her right to decide whether to associate with a Union.

The Court stated that it had previously been held that some information must be provided by the employer to the Union. Thus, the issue of this Application was to determine whether the nature of the information provided and the circumstances under which it was to be provided was allowable.

Upon a review of the Privacy Act, the Court found that some “personal information” is provided less protection under the Access to Information Act. Information provided less protection includes the name of a government employee, a person’s functions, title, business address and telephone number.

The Court determined that the Board erred in accepting the Union and employer’s agreement without analyzing the privacy aspects of such information on individuals, especially in the absence of submissions from parties who would have their privacy rights violated. The Court decided to remit the matter to the Board for redetermination, with the Privacy Commissioner made a party to the proceeding as an intervenor. The Complainant was also granted notice of the proceedings and an opportunity to participate.

Arbitrator award supports flexible model in assignment of Educational Assistants

The re-organization of work assignments for Educational Assistants (EAs) was the focus of a policy grievance in Renfrew County District School Board (“Board”) v. Elementary Teachers’ Federation of Ontario, Renfrew District, Educational Support Personnel Local (Work Assignments Grievance), [2010] O.L.A.A. No. 307. Specifically, the Union’s grievance raised the question of whether any alleged past practice of assigning a primary student to an EA in the context of the specific language of the collective agreement between the parties crystallized a form of “proprietary right” of the EA to a specific student in the way work was organized at the school.

In June of each year, assignments for the upcoming school year would typically occur whereby an early assignment letter would outline the EA’s assignment to a specific student for the following school year. The assignment letter outlined the role of the EA to provide “support to

classroom teachers for one or more identified exceptional students" and also indicated that the assignment may be subject to change, as determined by the Board, in order to meet the needs of the special education students. In some cases the assignment letter would assign the EA to more than one student, and it was interpreted by EAs to mean one primary student, with supporting or incidental services to the other named students. Evidence confirmed that, prior to the fall of 2007, the majority of all of the Board's elementary school's EAs were assigned in this manner.

In June 2007, EAs attended a meeting to discuss plans for the following school year, and were asked to provide input on their personal strengths and weaknesses and to indicate their preferences for placement in the upcoming fall term.

In September 2007, the Board implemented a new organizational work structure. The new schedule organized the workday into nine timeslots, with three blocks of three periods, requiring a student with special needs to potentially work with several different EAs during a single school day. The EAs expressed concern that the new schedule was not in the best interest of the students and would negatively impact upon the seniority and bumping rights under the collective agreement.

The Union presented evidence on the educational support personnel working within the Board's schools, including the variation in educational background and expertise, and the functions utilized in exercising the role of EA depending upon the needs of the student. Central to the dispute was the long standing practice of assigning an EA to work with one primary student during the school year. Thus, the EA would follow the primary student from class to class throughout the school year, assisting as required. The Union submitted that the EAs had a form of "proprietary right" in the individual student, and they could exercise their seniority to claim a particular student in the context of a vacancy, layoff or bumping situation provided the EA had requisite qualifications and skills to work with that student. Also the practice of issuing a layoff to an EA whose primary student left the Board, and to then permit the EA to exercise seniority rights to transfer or bump another EA, was relied upon as clear support for the Union's interpretation of the collective agreement

provisions and as an example of the exercise of the EA's "proprietary right" in the individual student.

The Board argued that it had the right to organize its workforce in a manner best suited to its business needs and in accordance with the collective agreement provisions. The Board submitted that there was no reference in the collective agreement to EA assignments to a "primary" or "incidental" student, and that the reorganization was properly within its management rights. Further, the Board noted that all of the assignment letters advised the EA that the appointment was not limited to any particular student(s) and that the assignment "may be subject to change". The Board disputed the concept of a "proprietary right" to any student or specific assignment and submitted evidence in support of the absence of a clear practice through the variety of organizational work structures in place at schools of the Board. Evidence was also presented that, following the implementation of the work reorganization, the EAs indicated that "they liked the variety" of working with more students and emphasized the need for effective communication between EAs about the progress of students. The Board did acknowledge, however, that since the reorganization there had not been any layoffs requiring the implementation of the bumping procedures under the collective agreement at the school.

Following a review of the relevant provisions of the collective agreement, and the interpretation and meaning given to the words "classification", "position", "assignment" and "the student" throughout the collective agreement, the Arbitrator concluded that the Board was not in violation of the collective agreement in its organization of work assignments for EAs at the impugned elementary school, and consequently the grievance was dismissed.

This grievance raised a number of significant issues with respect to the role of EAs. The award supports a more flexible implementation model.

Tribunal awards damages for poisoned work environment

Allegations of a sexually poisoned work environment were the focus of a recent human rights application in Dionne Newton v. City of Toronto, [2010] HRTO 1023. The Applicant alleged that she experienced a

sexually poisoned work environment when working at the Taxi Training Unit in the Municipal Licensing & Standards Division of the City of Toronto (“the City”) and that when her concerns were raised with management they failed to take appropriate steps to respond. Further she alleged that she experienced reprisal for reporting her concerns, as her employment with the City was ultimately terminated.

Of procedural interest is that the Adjudicator: took the lead in questioning the witnesses in the hearing; relied upon the findings made in the internal investigation by the City’s Human Rights Office of the Applicant’s allegations; relied on recommendations made for remedial action which were substantially accepted and acted upon by management; all of which is an exercise of the broad powers of the Adjudicator pursuant to s. 43 of the Code.

The investigation report substantiated many of the Applicant’s allegations relating to various inappropriate comments, touching as well as sexual jokes including: a note left on her work station which read, “I want to have sex with you”; comments about how long it had been since a co-worker had sex; unwelcome tickling of the Applicant by a co-worker, and training session exercises with sexual overtones such as an address of “Knocker Drive” in “Hooterville”. The report also noted allegations that were unsubstantiated relating to a specific co-worker and alleged comments made to the effect of, “I know you want to have sex with me”; “your breasts are firm”, and “good we’re alone” when in a room together after others had left. Overall, the Tribunal agreed with the report’s findings and concluded that the Applicant was subjected to a sexually poisoned work environment contrary to s. 5(1) of the Code. As this conduct was engaged in by City employees, the City was deemed liable for its employees Codeviolations pursuant to s. 46.3 of the Code.

With respect to the Applicant’s allegations that management failed to respond to her concerns, the Tribunal reviewed the steps taken in investigating the Applicant’s concerns from all levels of the organization, including the Applicant’s supervisor, management, human resources department and the City’s Human Rights Office, as determined by the investigation report.

The report indicated that when the Applicant discovered the offensive note at her work station, she contacted the Co-ordinator and they agreed to discuss the issue in greater detail the next day at work. The Applicant advised that she would also be contacting the Manager to discuss her concerns. The following day, the Applicant attended at the Co-ordinator's office to see whether the Manager was in. The Manager had not returned the Applicant's phone call the previous day and she later discovered that the Manager was at home sick. The Co-ordinator and the Applicant met and discussed the note that had been left in her office and her general concerns about sexual comments at training and in the workplace. The Co-ordinator offered support and assured her that the matter would be kept confidential and that he would follow up with the Manager to discuss her complaint. Although noting additional steps that the Co-ordinator could have taken, the Tribunal agreed that he did not fail in his obligation to respond appropriately to the Applicant's concerns and thus no violation of the Code was found.

The Manager was briefed on the Applicant's concerns by the Co-ordinator and was approached by the Applicant regarding the note and her concerns regarding male co-workers making inappropriate comments and innuendos at the office. The investigation report determined that the Manager was somewhat aware of the sexual comments and clowning that occurred at the office; and that it was management's responsibility to set standards and ensure a work environment free of harassment. Following an identification of the co-workers involved and due to the severity of the allegations, the Manager stated that he needed to address the two individuals directly with the Applicant's consent. Following a meeting with the staff identified by the Applicant, the Manager again met with the Applicant about the response received from one of the male co-workers alleged to have tickled her. The Manager told both the Applicant and the male co-worker that touching of any kind was inappropriate, and that any poking and/or tickling were to stop immediately. The Manager also advised that he was going to provide sensitivity training and have someone talk to all staff. The Manager also met with the second co-worker alleged to have made inappropriate sexual comments, and advised that he needed to be careful about his sexual comments.

The investigation report highlighted a number of gaps in the Manager's response including: no follow-up action was taken to identify the author of the sexual note or to communicate to staff about its inappropriate nature; no communication to staff about sexual comments and jokes; and, a lack of follow up discussion with the office as a whole about appropriate office behaviour, amongst others.

The Tribunal agreed with the report's findings, noting that an employer owes a duty to reasonably and adequately respond to an alleged violation of the Code. The Tribunal agreed that the Manager took the Applicant's concerns seriously and addressed them in a timely manner, however he failed to reasonably investigate the incident, failed to deal with the matter sensitively, and failed to provide a healthy, discrimination-free work environment as a result. The deficiencies fell below the standard of a reasonable and adequate response and as such the City was held liable for his failure to satisfy that obligation.

Failures were also identified in the Human Resources Department's response to the Applicant's allegations. The Human Resources Department attended at the office where the Applicant had worked to interview various employees on the general office environment. The Applicant was off on stress leave at this point due to workplace harassment and remained on leave until her subsequent termination. A referral was made by management of the Human Resources Department to the Human Rights Office for a further review of the employer's investigation of the matter.

The Human Rights Office determined that the Human Resources Department's investigation was inadequate for lacking specificity in its interviews with employees and did not include an interview of the Applicant as part of the Human Resources process. The Tribunal concurred, finding that the intervention by the Human Resources Department did not fulfil the obligation to "reasonably investigate and act" due to the deficiencies identified by the Human Rights Office and found a further basis to be liable under the Code.

The investigation conducted by the Human Rights Office however was reviewed as a thorough and complete investigation including interviews

of the Applicant, respondents and witnesses involved and the recommendations were substantially implemented by management fulfilling the City's duty to take reasonable and adequate steps in response to the Applicant's complaint.

With respect to the reprisal allegations, the Applicant alleged that following her complaint, her colleagues made sarcastic remarks such as "watch your language" or "sorry if that offended anyone" which was found to be a reprisal in violation of the City's policy and also in violation of s. 8 of the Code.

The final issue addressed by the Tribunal was the Applicant's subsequent termination from the City following her stress leave. The Applicant was off on an indefinite leave of absence for approximately one year. Despite using up all of her available sick days and correspondence from the City requesting clarification on her employment status, the Applicant had not provided any medical information to substantiate her prolonged absence from work, in contravention of the collective agreement. As a result of her omissions, the City determined that the Applicant was no longer interested in returning to the City and her employment was terminated immediately. The City's decision to terminate the Applicant in the circumstances was considered a reasonable decision and thus no finding of reprisal was made with respect to the termination.

As a result of the significant failures and noted omissions by various departments of the City, the Tribunal awarded the Applicant compensation for lost income and pension contributions and $15,000.00 as monetary compensation for injury to dignity, feelings and self-respect and pre-judgment interest on the award.

This decision clearly reinforces the parameters for a proper investigation of human rights complaints, as well as the requirements to implement appropriate measures in the workplace.

Court supports dismissal of Human Rights Complaint

The dismissal of a human rights complaint of discrimination and harassment in the workplace by the Canadian Human Rights

Commission (“Commission”) was the subject of an application for judicial review in Higgins v. Canada (Attorney General), [2010] F.C.J. No. 696.

The Applicant, Mr. Higgins, was employed by the Canadian Security Establishment (CSE) and participated in a competition for a position as a Senior Procurement Officer. The competition consisted of a 45-minute written examination and a 45-minute oral interview. The Applicant informed his employer that he had a learning disability and would require accommodation with respect to the competition, including additional time to complete the exam, a very quiet exam-writing environment, the use of a computer and spell check.

The employer confirmed that the written examination would occur in a quiet environment, on a computer with spell check access. The employer was also prepared to provide the employee with an extended period of time to complete the exam and requested that he indicate how much extra time he thought he would need as well as provide confirmation of his disability. Mr. Higgins presented supporting documentation of his learning disability and requested an additional 75 minutes, for a total of 1 hour and fifteen minutes.

On the day of the competition, the Applicant used the additional 75 minutes he initially requested, and then requested “a lot more time” to complete the exam’s written portion. He was provided an additional 5 minutes, which he found inadequate. Although ultimately passing the written portion of the exam, he was unsuccessful at passing the oral examination, and was screened out of the competition.

Approximately one month later, the employee filed an internal complaint alleging that he had not been properly accommodated during the staffing process. The employer investigated the complaint and questioned why the Complainant had never updated his learning disability assessment, as it was a shared responsibility between the employee and the employer. The employee disagreed and felt that it was the employer’s responsibility to request updated information. Some six months later, the employee followed up with an updated assessment that included new recommendations for adequate time to be provided to the Applicant to

answer questions and no time limits or penalties for the use of additional time during examinations.

Mr. Higgins then filed an internal complaint alleging harassment in the workplace. He alleged that management was attempting to coerce him to complete work outside of his job description; required him to report to a different supervisor; and, that he was subject to insults from other employees to the point of creating a poisoned work environment. The employer investigated the employee's second complaint and determined that this complaint was also unfounded.

The Commission's Investigator conducted a review of both incidents and accepted the employer conclusions that the evidence in both complaints did not support the allegation of harassment or a failure to accommodate. Accordingly, the Commission dismissed the complaints.

In the application for judicial review, the Applicant employee questioned whether the Commission's investigation was sufficiently thorough and procedurally fair; and whether the Commission made an error of law. Specifically, he argued that the Commission failed to investigate his second request for additional time; and, with respect to the allegation of harassment, that the Commission erred in law in concluding that none of the alleged harassing events were linked to the Applicant's disability.

Finding the Commission's decision with respect to factual determinations reviewable on the basis of reasonableness, and issues of law reviewable on the basis of correctness, the Court dismissed the application in its entirety. With respect to the Commission's investigation, the Court concluded that Commission and its investigators must be accorded with some discretion in determining how to conduct their investigation and that there was no unfairness in the process followed in its investigation of either complaint. The Court highlighted that the employee's allegations ignored the key fact that the Applicant and the employer had an agreement prior to the examination on the specific accommodations required and the additional time needed to complete the exam. The Commission's investigation concluded that he was reasonably accommodated and the Court affirmed that decision.

Similarly, the Court concluded that the question of whether the employee was subjected to harassment based on a prohibited ground was a question of fact, not a question of law. The Court noted that the Commission's investigation determined that the alleged harassing events did not constitute harassment because of his disability; but rather, occurred as a result of the employee's failure to complete his job or to follow normal workplace expectations. Finding the decision a reasonable one, the Court found no grounds for further review.

Yukon Court of Appeal upholds decision of non-discrimination

In Yukon (Human Rights Commission) v. Yukon (Human Rights Board of Adjudication), [2010] Y.J. No. 14, the Yukon Court of Appeal dealt with an appeal of the Human Rights Commission's finding concerning an involuntary imposition of sick leave on the grievor. The grievor suffered from bipolar disorder and was placed on medical sick leave. The grievor denied that his behaviour was caused by his disability and that this form of non-discipline discriminated against the grievor as there was no mechanism to challenge the employer's decision. The Yukon Human Rights Commission found that the grievor was placed on sick leave due to inappropriate conduct and not due to discrimination against the grievor due to disability.

The grievor had been working with the Department of Environment starting in 1995 and was diagnosed with bipolar disease following a manic episode in 1999. Ever since, the grievor had taken a proactive approach to educating both management and coworkers about his disability and had been receiving treatment from medical professionals and others. The Department of Environment accommodated the grievor by providing him a flexible schedule, including frequent breaks, and allowing him to work from home.

The grievor's condition was characterized by depressive phases of several months in the winter and hypomanic phases – including reduced need for sleep, increased energy levels, and increased mental acuity, but with reduced attention and focus - in the spring.

During a meeting in March 2004, the grievor criticized an upcoming project and challenged its course of action. The grievor's conduct at the meeting was deemed to be aggressive, argumentative and disruptive. The grievor's supervisor characterized the grievor as departing from the attitude of a solution-minded individual towards the attitude of a very aggressive and judgmental person. As result, the grievor was directed to be placed on paid sick leave with a strong recommendation that the grievor seek medical assistance.

The grievor viewed the supervisor's letter as demeaning. The grievor became more agitated upon discovering that the supervisor had disabled his computer account. The grievor saw his family doctor later that month, but did not seek an assessment. The grievor's doctor noted that the grievor was experiencing pressure of speech, which is a symptom of bipolar disorder. However, the doctor was unable to conclude that the grievor was in a manic state.

Approximately two months later, the grievor saw the doctor again. The doctor noted that the grievor displayed signs of hypomania. The doctor's medical report did not contain the recommendation of staying away from work since, as stated by the doctor, the grievor was already on leave.

Following this second visit to the doctor, the supervisor reinstated the grievor's computer access on the condition that outgoing communications be copied to the supervisor. Upon the employer's request the grievor undertook a psychiatric examination whereby the medical professional stated that the grievor was ready to return to work. The grievor returned to work, but requested accommodation in the form of not directly reporting to the supervisor.

At the Human Rights Tribunal, the grievor argued that he should have been disciplined rather than placed on sick leave so that he could dispute the employer's actions. The Human Rights Board held that the actions of the employer could not be viewed as stereotyping, especially in light of the six years of employment relationship between the parties, which involved the organization accommodating the grievor. In the Board's mind, the employer addressed what it had deemed to be

unsatisfactory behavior by considering the grievor's medical condition, and thus, did not act wrongfully.

The Court of Appeal pointed out that this case was different than many disability cases as the employer was aware of the condition and had been accommodating it for years. In the view of the Court of Appeal, the employer's actions were not "discipline" but rather further accommodation, keeping in mind that the grievor's condition was seasonal. The Court of Appeal did not decide whether the grievor's conduct was disruptive as that was the job of the Human Rights Board, a Board that found the grievor's actions to be disruptive.

Since an appeal to the Court of Appeal of a Human Rights Board's decision is reviewable only as to a question of law, the Court of Appeal could not review conflicting evidence relating to findings of fact. As result, the Court of Appeal decided to uphold the Human Rights Board's decision, finding that the grievor failed to establish a prima facie case of discrimination. Thus, the employer's actions were upheld.

Arbitrator dismisses complaint based on physical disability for use of drugs

In Leonard v. Noble Drilling Canada Ltd., [2010] N.L.H.R.B.I.D. No. 1, Arbitrator Burridge decided a complaint that Noble Drilling (the "employer") discriminated against Leonard (the "Complainant") on the basis of physical disability, contrary to the Human Rights Code. The Complainant had been dismissed following a positive drug test.

The Complainant was an offshore drilling contractor for an oil company, working in a supervisory position. In July 2002, the employer gathered its employees to discuss the discovery of a marijuana cigarette next to the reception area of an offshore base. Consequently, the employer conducted a drug test of its employees. The employer's drug policy stated that violation of the policy was cause for dismissal due to the concerns for safe, orderly and efficient operations.

The Complainant argued that he did not smoke on the day in question and did not know who owned the marijuana cigarette. The Complainant asserted that he was not a regular or recreational marijuana user. The

Complainant admitted to smoking marijuana prior to arriving to the offshore base. However, while the Complainant was aware that the drugs would still be in his system, he did not report this since it did not affect his ability to do his work.

The Complainant was notified a week later that he had tested positive. The Complainant was suspended and subjected to a second drug test. The second drug test was negative; however, the Complainant was dismissed days later.

The Complainant asserted that he was aware of two other employees who had dependency issues that were not discharged following a positive drug test.

The employer stated that safety was of the utmost importance and, given the Complainant's supervisory responsibilities, his positive drug test was particularly damaging. Since the Complainant tested negative during the second drug test, the employer stated that it had satisfied itself that it did not need to accommodate the Complainant as the Complainant was not an addict. Thus, the Complainant was terminated for violating the employer's drug policy, and not because the employer viewed the Complainant as a drug addict.

The Arbitrator decided that a perception that an individual is a drug addict, even if incorrect, could give rise to protection under the Human Rights Code. In this case, however, the Arbitrator found that the evidence did not lead to a finding that the employer perceived the Complainant to be a drug addict. Additionally, the Arbitrator found that a positive drug test did not automatically lead to the view that the positive tester was an addict. The Arbitrator found that when a recreational user, aware of an employer's drug policy, exposes him or herself to drugs, there may be sufficient grounds for termination.

Since the Arbitrator found that the evidence did not support the finding that the employer viewed the Complainant as a drug addict, the Complainant did not receive protections under the Human Rights Code, and thus, the dismissal of the Complainant was upheld.

Tribunal finds breach of Code based on record of offences

In Dubé v. CTS Canadian Career College, [2010] O.H.R.T.D. No. 673, the Human Rights Tribunal dealt with whether the CTS Canadian Career College's ("the College") was entitled to revoke a job offer after discovering that the Applicant was a pardoned ex-convict. The Applicant claimed that he was discriminated against in employment on the basis of disability and record of offences, and the subject of reprisal or threat of reprisal by the College, contrary to the Human Rights Code.

The Applicant interviewed for a position within the College as Addictions Interventions Instructor. The Applicant received a phone call from the College following the interview to offer him the position. The next day, the Applicant met with the College; however the College stated that it was not in a position to offer the Applicant a position since the Applicant had not been forthright in his application, specifically referring to his well-known criminal past. The College did not specify what it had heard or the source of the information.

The Applicant was a well-known ex-offender and recovering addict. He had written a book describing his experiences while incarcerated. The Applicant had given a number of interviews and had spoken publicly regarding his experiences as an inmate and as a former addict. According to the Applicant's testimony, he had been off drugs and out of prison for 20 years and had been pardoned for the offence of murder.

During the initial interview with the College, the Applicant stated that he had personal experience with addictions. The College did not ask him to elaborate. Thus, the Applicant was under the impression that he was sufficiently forthright during the job interview. Following the revocation of the job offer, the Applicant, and friends of the Applicant, testified that the Applicant was demoralized and losing hope.

The College took the position that hiring the Applicant would have catastrophic consequences on the College. The Applicant took this to refer to the reputation of the College; however, the Applicant viewed his experiences as a benefit to the College, rather than an issue the College would have to overcome. The Applicant's assertion was supported by favourable recommendations from his references.

The College testified that after making the offer of employment to the Applicant, an administrative assistant brought the Applicant's former conviction to the College's attention. The College was unsure how to proceed. Mindful of its reputation, the College withdrew its offer. This was similar to the College's general policy, with limited exception, that students and teachers at the College must have clean criminal records.

There was evidence that the individual hired in place of the respondent was only considered for the position following the revelation of the Applicant's criminal record. The Applicant campaigned for the position even after it had been given to another individual. The Applicant went to the College and approached the individual hired in place of the Applicant. In front of students, the Applicant argued his position. The individual hired in place of the Applicant stated that the students were not comfortable with the Applicant's approach and that the Applicant had frightened her.

The Applicant followed this encounter with an e-mail to the individual hired in place of the Applicant. The e-mail, while frightening to the recipient, was deemed to be a plea for help and support by the Tribunal. The individual hired in place of the Applicant reported this e-mail to the College. The Applicant sent another, more aggressive, e-mail to the individual hired in place of the Applicant. Following this latter e-mail, the individual hired in place of the Applicant resigned due to a concern for her wellbeing and safety and due to the climate of stress and fear. The College argued that these actions after the job offer was revoked were relevant as it provided evidence that the College's reputation may suffer if the Applicant were hired.

The Tribunal determined that the Applicant was not discriminated against on the basis of disability. The evidence was clear that the basis for revoking the offer of employment to the Applicant was his record of offences, and not a disability associated with being a former addict.

Referring to a Supreme Court decision, Quebec v. Maksteel Quebec, [2003] 3 S.C.R. 228, the Tribunal stated that an individual is unfairly stigmatized if the individual's offence is not objectively connected with the employment or if the individual has been pardoned. This principle

applies regardless of the seriousness of the offence. Since the employment offer was made and subsequently revoked, the Tribunal found that the Applicant had established a prima facie case of discrimination.

The Tribunal rejected the argument that the Applicant's subsequent actions in attempting to regain the employment position were relevant to the question of whether the Applicant had been discriminated in the withholding of the employment offer. The Tribunal was also unwilling to deem the Applicant's subsequent actions as vexatious or harassing. It was the Tribunal's view that the reactions of the College to the Applicant's campaign for the position were more indicative of the stigma and stereotypes related to his offences, rather than providing evidence that the Applicant was threatening or frightening.

The Tribunal noted that the Applicant was under no obligation to disclose his past convictions in the absence of a reasonable and bona fide occupational standard requiring a clean criminal record. In this case, the Applicant had not been dishonest, he merely did not disclose that which he was under no obligation to disclose. A pardon acts as a restoration device to place the pardoned individual in the same social status that he or she would otherwise enjoy but for the conviction. Thus, there was no basis for requiring the Applicant to disclose his past criminal record.

The Applicant filed a similar complaint against an individual working as Campus Director; this complaint was dismissed. The claim alleged that the individual was responsible for revoking the offer after being notified of the Applicant's criminal past, and thus was the cause of the breach of the Human Rights Code. The reason for dismissing the claim against the individual was that the Campus Director was, at all material times, acting within her scope as a staff member of the College. To the extent that the individual's actions contributed to the breach of the Code, the individual was not held liable.

The College was ordered to compensate the Applicant for injury to his dignity, feelings and self-respect, for loss of employment income, and

post-judgment interest. The College was also ordered to implement a plan to promote future compliance with the Code.

Grievance Board finds no discrimination on basis of family status

In Alberta (Solicitor General) v. Alberta Union of Public Employees, (Jungwirth Grievance), [2010] C.C.S. No. 5674 (Ponak, Bartee, Workman), the Grievance Arbitration Board dealt with the grievance of an individual ("the grievor") after her shift schedule was changed. The Union argued that the schedule change amounted to discrimination against the grievor on the basis of family status. The Union claimed that the employer failed to accommodate the grievor.

The grievor was a correctional officer with the employer for 20 years. The employer scheduled employees in one of three shifts, from 7 a.m. - 3 p.m., 3 p.m. - 11 p.m., and 11 p.m. - 7 a.m. While policy dictated that employees generally rotate through every shift, there is an override allowing an employee to stay with a specific shift if the employee is incapable of performing the work effectively during the other shift. The grievor typically rotated only through the morning and afternoon shifts. This was made possible because an individual in the grievor's shift voluntarily worked the 11 p.m. - 7 a.m. shift.

The individual voluntarily working the 11 p.m. - 7 a.m. shift was relocated due to attendance concerns. Consequently, the grievor was directed to work a total of 30 late shifts annually.

The grievor is a single mother of an 11-year-old, and is the primary caregiver. The grievor stated that it was difficult to find care arrangements for her child during the late shift since her ex-husband worked a permanent 7 p.m. - 7 a.m. shift. During this period of overlap, the grievor's ex-husband was able to look after the child for two to four of the days per week. The alternative arrangements (i.e. the child staying with relatives) were viewed by the grievor as untenable due to the disruption in the child's life.

The employer argued that it was unable to find other arrangements for the grievor. The employer had a policy of requiring a female correctional

officer to monitor female inmates. This policy was put into place following a riot of the female inmates and the logic of the policy was supported by research.

The employer argued that the Grievance Board did not have jurisdiction for the grievance since protections against human rights violations are outside the collective agreement. The Grievance Board relied on a Supreme Court decision inParry Sound Social Services Administration Board v. O.P.S.E.U. (2003), SCJ No. 42, where the Court found that:

"… a collective agreement cannot be used to reserve the right of an employer to manage operations and direct the work force otherwise than in accordance with the employee's statutory rights, either expressly or by failing to stipulate constraints on what some arbitrators regard as management's inherent right to manage the enterprise as it sees fit."

As result, the Board concluded that human rights and employment statutes of a general nature are imported into collective agreements and can be subject to arbitration.

Regarding the claim of discrimination on the basis of family status, the Union argued that there were a number of possible accommodations that the employer could provide to the grievor. Furthermore, accommodation should not have been difficult since the grievor was not seeking a full exemption from the late shift, but merely a reduction in such shifts.

The employer argued that there was no discrimination against the grievor as the grievor was not the only employee with a child. The employer asserted that since many individuals have children, a case of discrimination on the basis of family status could only be found in exceptional situations where parental responsibilities fell outside normal responsibilities. The employer took the view that possible accommodation that would result in male employees monitoring female inmates was unreasonable since the provision of female employees to female inmates was a bona fide occupational requirement.

After reviewing Court and tribunal decisions, the Grievance Board determined that discrimination cases based on family status involving

parental obligations required a careful assessment of the parental obligation and the degree of interference of this obligation into bona fide occupational requirements.

The Grievance Board determined that the grievor had the onus of establishing that reasonable alternatives for care of the child were unavailable. The Grievance Board determined that the child could stay with his father for a portion of the weeks involving overlapping shifts between the grievor and ex-husband. Additionally, while the grievor was not satisfied with an arrangement whereby her child stayed with relatives, there was insufficient proof that this arrangement would negatively affect her son's well-being.

Since the majority of the Grievance Board found that reasonable alternative arrangements existed for the care of the grievor's child, a prima facie case of discrimination on the basis of family status was not established. Consequently, the grievor had not been discriminated against on the basis of family status.

Court finds wrongful dismissal for employee with personal issues

In Jazarevic v. Schaeffler Canada Inc., [2010] O.J. No. 1804, the Ontario Court of Justice dealt with a wrongful dismissal claim. The dismissed employee (the "Plaintiff"), a machinist, alleged that he was terminated without just cause by Schaeffler Canada Inc. ("the employer"). The employer had a policy that provided for the dismissal of an employee who faced discipline for any four infractions occurring in a 12-month period.

The Plaintiff's wife had passed away in 2004, leaving the Plaintiff to care for his five children, who were between the ages of 4 and 16. Following the passing of his wife, the Plaintiff was diagnosed with reactive depression and anxiety disorder, requiring the Plaintiff to take short-term disability with the employer.

Prior to 2002, the Plaintiff had been disciplined for failing to check and verify the set-up of his machine. In October 2002, the Plaintiff was disciplined for failing to adhere to his control plan, which resulted in the

production of non-conforming parts. The Plaintiff was also sent discipline notices in December 2003 and August 2004 for contravening the employer's absenteeism policy. The Plaintiff faced another discipline notice in September 2004 for failing to adhere to the control plan.

The Plaintiff was suspended for three days following the discipline notice of September 2004, as this was the third discipline notice within a 12-month period. The Plaintiff was notified that another discipline notice prior to December 2004 would lead to the Plaintiff's dismissal.

The Plaintiff was next disciplined in June 2005 for violation of the company's absenteeism policy. This being the third discipline notice in twelve months, the Plaintiff was suspended for 2 days. The Plaintiff stated that this absence was due to his mother suffering a stroke.

The Plaintiff was issued another discipline notice in July of 2005, his fourth within a 12-month period. The Plaintiff told his team leader that he was having difficulty concentrating and suffered from a drinking problem. The employer took the Plaintiff to the company nurse and disability claims administrator, but did not review the results. The Plaintiff was diagnosed with major depression and alcohol dependency.

Following this latest event, the Plaintiff was terminated. While the discipline policy was known to the Plaintiff, there was dispute over whether the policy constituted a term of the Plaintiff's employment. This is important since it is the employer's responsibility to prove to the Court that the Plaintiff's actions constituted a repudiation of the employment relationship, which would justify discharge.

In examining the Plaintiff's conduct, the Court examined the seriousness of the misconduct and the impact of the misconduct on the employment relationship. The Court noted that the Plaintiff's wife's passing had a profound impact on the Plaintiff. The Court also noted that the four-strike discipline policy was not mandatory and that it was subject to review by management. In this case, no review was made.

The Court determined that the employer should have followed up with the company's nurse after sending the Plaintiff to the nurse in July 2005. The Court took the view that the company took the correct step of

sending the Plaintiff to the nurse, but the Court was unable to reason why the outcome of the referral was never investigated. The Court held that in this case, the appropriate course of action was to provide assistance to the Plaintiff through treatment. The employer's enforcement of the discipline policy in light of the Plaintiff's personal problems was not appropriate.

The Court noted that it was not making light of the Plaintiff's actions in rendering its decision. Rather, the Court was taking into account the surrounding circumstances in determining that the Plaintiff's actions were not sufficiently egregious to undermine the employment relationship. The Court ordered that the employer pay the Plaintiff seven months' notice for its wrongful dismissal.

Court reviews indicia of employment / independent contractor

In Ligocki v. Allianz Insurance Company of Canada, [2010] 100 O.R. (3d) 624 (Sup. Ct.), the Superior Court heard a preliminary motion to determine whether the Plaintiff was an employee or an independent contractor for the purpose of calculating his income replacement benefits. The Defendant sought a declaration that the Plaintiff was self-employed and the Plaintiff sought a declaration that he was an employee at the time of his motor vehicle accident.

The Plaintiff was a full-time personal support worker for the Victorian Order of Nurses (VON). Part of his duties included care for an elderly patient who lived with his adult son. After approximately six months, VON terminated its services to the patient. The Plaintiff made an oral agreement with the son of the elderly patient to continue his home care services consistent with his duties during his employment with VON. Pursuant to this oral agreement, the Plaintiff invoiced for time worked and all personal care items that were required for the care of his father were provided by the patient's son. The Plaintiff was paid by cheque, took no source deductions and remitted his own CPP payments. The arrangement remained in effect until the Plaintiff's accident.

In analyzing the facts, the Court noted that the determination of whether a worker is an employee or an independent contractor is largely a finding

of fact taking into account the total relationship of the parties. The Court rejected the traditional control test as the sole test used to determine employment status stating: “The key question is whether the individual has been engaged to provide services as a person in business on his or her own account, weighing each of these factors against the particular facts and circumstances of the case.” An analysis of relevant factors included: whether the employer had the power to control the way in which the employee performed his duties; whether the employer provided whatever was necessary to complete the work; the degree of financial risk; the degree of responsibility and the worker’s opportunity for profit.

Applying these factors to the case at bar, the Court concluded that the relationship was best characterized as an employer/employee relationship as it had no indicia of an independent contractor relationship, except the manner in which he was paid and how he reported his income. The Plaintiff did not have control over the way he provided his services, did not provide his own equipment, did not have the authority to hire others, and had no opportunity for profit or risk.

With respect to the intention of the parties and the weight to be accorded to such a factor, the Court noted that such factors could be a relevant consideration. In this instance both parties conducted themselves as though the Plaintiff was an independent contractor. However, the Court highlighted that the parties chose to put a legal characterization on their relationship that best suited them at the time, which made this factor non-determinative of the actual employment relationship. The Court determined that the Plaintiff’s self-identification as an independent contractor at the beginning of the contract, and later adjustment to an employee, was not sufficient to trump the Courts determination of the employment relationship on the facts, and as such the Court declared that the Plaintiff was an employee at the time of the motor vehicle accident.

While these situations are fact driven, the factors taken into consideration by the Court could lead to a different conclusion than the relationship intended by the parties.

- Home
- About Us
- Services
- Lawyers
- Insights
- Contact Us

Office:
1 Toronto Street, Suite 910
Toronto, ON M5C 2V6

Phone: (416) 367-2900
Fax: (416) 367-2791

Terms of Use
Disclaimer and Copyright Information

Website Designed and Optimized by Clutch Marketing